

**ORIGINAL**

Before the  
**Federal Communications Commission**  
 . Washington, D.C. 20554

**RECEIVED**

AUG 16 2002

In the Matter of )

Amendment of Section 73.202(b) )

Table of Allotments, )

FM Broadcast Stations )

(Cheboygan, Rogers City, Bear Lake, )

Bellaire, Rapid River, Manistique, )

Ludington, Walhalla and )

Onaway, Michigan) )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MM Docket No. 00-69

RM-9850

RM-9945

RM-9946

To: Assistant Chief, Audio Division  
 Media Bureau

**REPLY TO OPPOSITIONS TO  
 PETITION FOR RECONSIDERATION**

Fort Bend Broadcasting Company ("Fort Bend"), by its counsel, hereby replies to the Oppositions filed by Lake Michigan Broadcasting, Inc. ("Lake Michigan"), Northern Radio of Michigan, Inc. ("Northern") and Northern Radio Network Corporation ("NRN") in response to the Petition for Reconsideration filed on July 3, 2002 by Fort Bend. In support hereof, Fort Bend states as follows:

1. Each of the Oppositions claims that Fort Bend's Petition for Reconsideration does not conform to Section 1.429 of the Commission's Rules because new facts are presented which could have been proffered at an earlier stage. The background of this case is as follows: Fort Bend (with its predecessor, D&B Broadcasting, LLC) submitted a Counterproposal on June 16, 2000 which, inter alia, proposed the allotment of Channel 260C1 to Bellaire, deletion of Channel 261A from Bear Lake and the modification of Station WSRQ(FM)'s license accordingly. To replace the service at Bear Lake, Fort Bend (and D&B) proposed the allotment of Channel 291A to Bear Lake. NRN and Northern Radio, among others, submitted Reply Comments raising

No. of Copies rec'd  
 List ABCDE

074

technical issues with respect to the Bellaire and Bear Lake proposals. Those issues were addressed by Fort Bend in its Reply Comments of September 15, 2000.

2. The Commission's Report & Order (DA 02-1156, released May 17, 2002) denied the allotment of Channel 291A to Bear Lake due to the location of the reference coordinates in an area designated as a swamp. The R&O did not deny the Bellaire or Bear Lake proposals due to terrain shielding or obstructions prohibiting line of sight to either of the communities. Thus, there would have been no reason to address these matters in Fort Bend's Petition for Reconsideration except that Northern Radio filed a Petition for Reconsideration prior to the deadline which raised the terrain obstruction issues.

3. Fort Bend's Petition for Reconsideration properly responds to matters raised by Northern Radio in its prior filed Petition for Reconsideration. To the extent new facts were presented, they were justified due to changed circumstances and as a matter of public interest. Fort Bend's response was based on a new interpretation on the line of sight requirement established in a case decided after the last opportunity for replies. That case was Jackson and Salyersville, Kentucky, 17 FCC Rcd 4662 (2002). Fort Bend believes that case justified the submission of engineering material responsive to Northern Radio in order to assist the Commission in properly resolving this case. See Moncks Corner, Kiawah Island and Sampit, South Carolina, 15 FCC Rcd 8973 (2000). In Moncks Corner, the Commission staff stated that Section 1.429(b)(3) "allows new matters not previously presented to the Commission to be considered if the Commission finds that such consideration is in the public interest." At para. 12. See also Homerville, Lakeland and Statenville, Georgia, 8 FCC Rcd 2953 (1993), East Brewton, Alabama and Navarre, Florida, 14 FCC Rcd 6974 (1999), and Garden City, Indiana 6 FCC Rcd 3747 (1991). Thus, Fort Bend is relying on Section 1.429(b)(1) and (3) to present responsive

engineering information which should be considered in order for the Commission to reach a decision in the public interest.

4. As Fort Bend stated in its Petition for Reconsideration, a first local service to Bellaire would be favored over a first local service to Onaway based on its larger population. Blanchard, Louisiana and Stephens, Arkansas 8 FCC Red 7083 (1993). Thus, it is crucial that the Commission rely on proper technical information before rendering its decision.

5. In its Petition for Reconsideration, Fort Bend demonstrated that the Commission erred in its finding that there was no suitable site for the allotment of Channel 291A at Bear Lake. Fort Bend clearly established with pictures and statements of qualified experts that the reference point location was on dry land and suitable for a transmitter site. This showing was not challenged by any of the opponents. Instead, each party objects on procedural grounds that Fort Bend's showing was submitted too late for consideration. However, as Fort Bend has argued, the Commission was clearly wrong in its assumption that the available area for a Bear Lake site is unsuitable. The Commission staff can not ignore the factual information which allows the Commission to make the proper finding in the public interest. That is why Section 1.429(b)(3) exists. The overriding goal must be for the Commission to make a proper determination when its assumptions are shown to be incorrect.<sup>1</sup>

6. As for the line of sight issues that Northern Radio and NRN continue to rely on, the R&O did not deny Fort Bend's proposal due to any line of sight or city grade deficiencies as both Northern Radio and NRN recognize. Fort Bend stated in its Petition for Reconsideration that its proposal for Bellaire and Bear Lake complies with Section 73.315 because the

---

<sup>1</sup> Of course, as noted in its Petition for Reconsideration, the Commission staff ruled in another proceeding released the same day that Channel 291A could be allotted to Bear Lake. Honor, Bear Lake, Ludington, Walhalla and Custer, Michigan, MM Docket No.

requirement that there be line of sight is not mandatory and the respective predicted 70 dBu signals extend beyond Bellaire and Bear Lake. The primary basis for the disagreement between the opponents and Fort Bend is the extent to which the Commission relies on the line of sight requirement when the predicted 70 dBu signal extends beyond the community of license.

7. In Jackson and Salyersville, Kentucky, supra at para. 4, the proponent recognized that its proposal would not provide line-of-sight over the community of Jackson due to “unusually rugged terrain.” citing Madison, Indiana, 14 FCC Rcd 9518 (1999) and Vacaville and Middletown, California, 4 FCC Rcd 8315 (1989), recons. denied, 6 FCC Rcd 1431 (1991). However, the predicted 70 dBu signal would extend beyond Jackson using the Longley Rice prediction method. The Commission examined the terrain and the predicted signal strength and agreed with the proponent. Here, Northern Radio suggests that the Jackson case can be distinguished because a portion of the community would be covered and an unrealistic antenna height was used to predict coverage. Northern Radio has cited no case law to support its position that covering some portion of the community with a line of sight service is decisionally significant in demonstrating compliance with Section 73.315. It certainly does not indicate how much of the community would need to be reached under this purported standard.

8. As for how realistic the antenna height must be to comply with Section 73.315, Northern Radio bases its assumptions on the need to provide line of sight. However, if line of sight is not mandatory, the antenna height is not as “unrealistic” as Northern Radio suggests. Indeed, Fort Bend demonstrated in its Petition for Reconsideration that the standard height for a Class C1 (299 meters HAAT) at Bellaire would suffice. The same is true for Bear Lake. Fort Bend hereby affirms that it is willing to construct an approximate 900 foot tower for Bellaire and

---

01-186 (DA 01-1155, released May 17, 2002). Northern Radio also recognized this inconsistency in its Petition for Reconsideration.

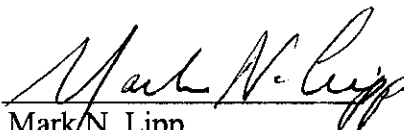
an approximate 700 foot tower for Bear Lake. Northern Radio's attempts to distinguish Madison, Indiana and Vacaville, California are similarly unsuccessful. In both instances, Northern Radio points to factual differences which did not form the basis for the decision.

9. Finally, NRN asserts that Fort Bend failed to demonstrate that Channel 259A should be allotted to Rapid River, Michigan because when a proposed site is located in a National Forest it must be demonstrated that the site is actually available citing Neihart, Montana 14 FCC Rcd 18977 (1999). However, the Neihart allotment was denied due to the proponent's failure to demonstrate community status. As for showing that a site in the National Forest is actually available, the Commission staff stated in that case that such a showing was one of several ways that site availability could be shown. On the other hand, Fort Bend cited in its Petition for Reconsideration several cases which hold that it is not necessary to show that the Forest Service has actually consented to the construction of a tower. Indeed, there are several areas within the available site window that is on privately owned land. Thus, the allotment of Channel 259A to Rapid River should have been made.

10. Accordingly, for the reasons stated, the Commission should reconsider the Report and Order and grant Fort Bend's Counterproposal.

Respectfully submitted,

FORT BEND BROADCASTING  
CORPORATION

By: 

Mark N. Lipp

J. Thomas Nolan

Shook, Hardy & Bacon, LLP

600 14<sup>th</sup> Street, NW

Washington, DC 20005-2004

(202) 783-8400

Its attorneys

August 16, 2002

## CERTIFICATE OF SERVICE

I, Lisa Balzer, a secretary in the law firm of Shook, Hardy and Bacon, do hereby certify that I have on this 16<sup>th</sup> day of August, 2002 caused to be hand-delivered or mailed by first class mail, postage prepaid, copies of the foregoing **"REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION"** to the following:

\*John A. Karousos, Assistant Chief  
Audio Division  
Office of Broadcast License Policy  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

\*Ms. Kathleen Scheuerle  
Audio Division  
Office of Broadcast License Policy  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Scott R. Flick, Esquire  
Brendan Holland, Esquire  
Shaw Pittman  
2300 N Street, N.W.  
Washington, D.C. 20037  
Counsel to Lake Michigan Broadcasting,  
Inc.

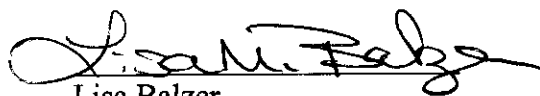
Denise B. Moline, Esquire  
PMB #215  
1212 South Naper Boulevard, Suite 119  
Naperville, Illinois 60540  
Counsel to Escanaba License Corp.

Jerrold D. Miller, Esquire  
Miller & Miller, P.C.  
1990 M Street, N.W., Suite 760  
Washington, D.C. 20036  
Counsel for D&B Broadcasting, L.L.C.

Harry C. Martin, Esquire  
Lee G. Petro, Esquire  
Fletcher, Heald & Hildreth, P.L.C.  
1300 North 17<sup>th</sup> Street  
11<sup>th</sup> Floor  
Arlington, VA 22209-3801  
Counsel to Northern Radio of Michigan, Inc.

Matthew M. McCormick, Esquire  
Reedy, Begley & McCormick  
2175 K Street, N.W., Suite 350  
Washington, D.C. 20037  
Counsel for Northern Radio Network  
Corporation

Cary S. Tepper, Esquire  
Booth, Freret, Imlay & Tepper, P.C.  
5101 Wisconsin Avenue, N.W., Suite 307  
Washington, D.C. 20016  
Counsel for Todd Stuart Noordyk  
Counsel for MacDonald Garber  
Broadcasting

  
Lisa Balzer

\* Hand Deliver